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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

FILCO, ANTON J. SACA, ILHAM SACA, ROSE M. KARADSHEH and NAHIL ACTENHOFEN,
Petitioners,

vs.

AMANA REFRIGERATION, INC.; LAMCO APPLIANCE, INC.; and BOULEVARD T.V. & APPLIANCE, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the court below erred in affirming summary judgment against plaintiffs as a matter of law because there was no direct evidence of a contract or agreement to fix prices but where there was evidence from which a jury could infer that plaintiffs were cancelled as dealers in response to pricing complaints by competitors and that plaintiffs' cancellation resulted from an illegal combination between the defendants to eliminate price competition between dealers.

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OPINIONS BELOW

The opinion of the district court granting defendant Amana's motion for summary judgment is set forth in Appendix A.

The opinion of the Ninth Circuit Court of Appeals affirming the district court's summary judgment in favor of defendant Amana is reported at 1983-1 Trade Cases § 65,450 (9th Cir. 1982) and is set forth in Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on June 10, 1983. Petitioner filed a motion to stay the mandate of the Court of

Appeals pending petition to this Court for a writ of certiorari on June 24, 1983. Petitioner's motion for stay of mandate was denied by order of the Court of Appeals dated July 5, 1983.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The federal statutory provisions involved are:

(a) Section 1 of the Sherman Act, 15 U.S.C. § 1, which states:

> Every contract, combination in the form of trust, or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(b) Rule 56 of the Federal Rules of Civil Procedure, which provides, in relevant part:

> "Rule 56. Summary Judgment.
>
> "(c) *Motion and Proceedings Thereon.* The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

STATEMENT OF THE CASE

This case presents the Court with an opportunity to resolve a conflict among the Courts of Appeal as to whether concerted action is still implied as a matter of law under § 1 of the Sherman Act, 15 U.S.C. § 1, or whether a "contract or agreement" is now required to be proven by direct evidence. The conflict arose because of a change in legal standards adopted by three Circuits after this Court's decision in *Continental T.V. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

The Ninth Circuit in this case joins the Second and Third Circuits in holding that, as a matter of law, no "combination or conspiracy" can be established solely by proof that a manufacturer takes action to stop price cutting in response to pressure from non price-cutting customers.

The Seventh and Eighth Circuits have explicitly rejected these holdings and have ruled that proof acts such as a termination in response to competitor complaints is sufficient evidence of concerted action under Section 1. These Circuits base their holdings on earlier decisions of this Court. Because the conflict involves a heavily-litigated question which has been addressed by a number of circuits, and because important legal and economic policies are at issue, the conflict should be resolved by this Court.

This Court granted certiorari in *Monsanto Co. v. Spray-Rite Service Corp.*, No. 82-914, a case involving the same issues. The petition for certiorari in *Monsanto* was filed on December 7, 1982 from the decisionreported at 684 F.2d 1226 (7th Cir. 1982). There is also pending in the Court a petition for writ of certiorari, filed November 19, 1982, in the case *Service Merchandise Company, Inc. v. Amana Refrig-*

eration, Inc., No. 82-848, from the decision reported at 686 F.2d 1190 (6th Cir. 1982). That case challenges the same pricing practices of Amana which are challenged in this case.

A. The Proof In the District Court

The defendant Amana Refrigeration, Inc. ("Amana") is a large manufacturer of freezers, refrigerators, and other appliances which it distributes and sells nationally. Amana's headquarters are in Amana, Iowa, and its manufacturing facilities are located in other locales throughout the country as well. Amana products are sold directly to distributors throughout the United States who in turn sell to retail stores such as the plaintiffs' herein. Certain of the largest Amana distributors are actually owned and operated branches of Amana.

Through its independent distributors and branch operations, Amana insures that its products are sold at established retail price levels. Retail price levels are set by Amana by utilizing suggested retail price lists. These lists are prepared by Amana and routinely mailed to the branch operations and independent distributors who in turn see to it that their retail accounts have the lists and price in accordance with them.

Pricing at the retail level is closely monitored by Amana and its retail dealers who do not want their profit margins on Amana products eroded by competing retail dealers. Amana, with the cooperation of its retail dealers, sees to it that discount operations do not get Amana products. Discount operations are retail outlets that operate on a volume basis such that they are able to offer their products at reduced prices. Discount operations are a widely-accepted

method of retailing other appliance lines and are responsible for saving consumers millions of dollars annually.

On occasion, discount operations are able to obtain the Amana line. This meets with swift action by Amana. Discount dealers are either reported to Amana by third parties or detected directly by Amana itself almost immediately. In those cases where a discounting dealer refuses to comply with Amana's pricing policies, he is "dried up" or denied a source of supply. Thus, the prevailing level of prices is restored in one way or another, and the status quo is preserved, to the substantial detriment of non-complying dealers and the consumer.

A letter dated February 16, 1976, from Jeffrey Distributing Company to "Amana Distributors selling Dillard Department Stores" [CR 94, Exhibit A],[1] states:

> "Enclosed is a copy of the price sheet we are now using for Dillard Department Stores in Little Rock.
>
> "A copy of this price sheet has also been se[n]t to the corporate office."

Amana distributors are theoretically independent, competing businesses.

Dillard's is a large retail chain store which posed the problem of buying in quantity (and at reduced price) from one distributor for sale at its various retail stores at similarly-reduced retail prices. Some of these retail stores were located in the sales territory of the distributor who actually sold Dillard's the Amana merchandise. Others of these retail stores were located in the sales territory of other distributors. This upset these other distributors who

---

[1]References are to the Court Record in the Court of Appeals.

did not sell the merchandise originally but who nevertheless had it sold by Dillard's stores within their exclusive distribution territory. More importantly, Dillard's could offer the merchandise at discounted retail prices, thus upsetting other retailers in the area.

The Dillard's situation was not allowed to upset the Amana pricing system whereby retail prices are fixed and stable, and distributors respect each other's exclusive sales territory. CR 94, Exhibit B, is a letter from Amana dated May 12, 1977, which states:

> The following outlines the agreement worked out between you and Chytrus Distributing concerning the Dillard's Account.

Amana put its stamp of approval on an agreement between two of its independent distributors, direct competitors, whereby one distributor was to receive a "3% override" on products bought from the first distributor and sold at retail in the second distributor's territory. This three-percent override was, of course, passed on to Dillard's so that it would have to price higher at retail. Thus, the net result of this agreement was protection of prevailing retail prices.

Amana was highly concerned with insuring that its distributors knew the retail price and the origin of all Amana products sold in their territories. It offered its own resources for this purpose. CR 94, Exhibit C, is "Important Notice" dated October 3, 1977, from Amana to all Amana Distributors, which ends:

> As you know, Amana has a computer system for keeping track of where product is shipped. If you have a question on the origin of a product, simply

> let us know the serial number and we can find out immediately the distributor to whom the product was originally shipped."

One effective way to set retail prices which was condoned by Amana was uniform price advertising. CR 94, Exhibit D, is an October 4, 1977 document from the files of Amana which was prepared by an Amana distributor for its retail dealers. It ends:

> The RR-9 [radarange] is running in the ad at $549.00 so it should enable all of you to give the Country Cooker away with purchase.

Clearly, the intent of this promotion was to insure a uniform, fixed price high enough to account for the added cost of the giveaway item.

Independent Amana distributors obediently reported on "unauthorized" product coming into their exclusive territories. CR 94, Exhibit E, is a November 29, 1977 letter from Amana to its Tennessee distributor which states:

> "Thank you for your letter of November 9th concerning the RR-9 serial #052716010 picked up from Service Merchandise.
>
> "Our computer read out tells us that this unit was sold to the Rocket Stores by MKS Distributors in Syracuse, New York. We know of this transaction and *it is one that has been shut off.*
>
> *"Keep the serial numbers coming and we'll keep 'pressing'."* [Emphasis added]

Service Merchandise was discount operation which attempted to compete in the Nashville market but which soon found itself unable to get Amana products. This letter makes clear that Service Merchandise was shut off by

Amana at the urging of its distributor. The November 9 letter referred to in the exhibit has never, inexplicably, been produced.

CR 94, Exhibit F, is a document produced from Amana files from one of its distributors to all that distributor's retail dealers. Although the document is undated, it clearly refers to the aforementioned discounting activities of Service Merchandise in the Nashville area. It states, in pertinent part:

> Recently as some of you know, an outfit by the name of Service Merchandise published in one of their flyers an Amana RR-9 at $439.00. Since that time I have received numerous calls of displeasure and rightfully so! All calls were asking for results in stopping this, accusations of selling the units to them and questions about the price, wondering how they can do it for $439.00.
>
> • • •
>
> "2] Amana Refrigeration, Inc., Amana, Iowa, is not selling Service Merchandise. It is completely against company philosophy!"

The letter concludes:

> "We thank the dealers who are willing to work with us to solve problems like this and ask those others to give us their backing and *go after these people as partners* in business good times or bad, since problems like this in one form or another, sometimes within our own family, do happen." [Emphasis added]

To the same effect is CR 94, Exhibit G, another Amana document, dated December 2, 1977:

> "This is in regard to your note of 11/28/77 concerning the transshipping of Radarange model RR-9 serial Number 000052709111.

> "The computer read-out tells us this unit was shipped to our distributor on 1/27/77 who in turn sold it to a dealer by the name of Rocket Stores on 2/14/77.
>
> "Steve, this is one we know about and have been on top of this; *we believe the source to be dried up at this time.*" [Emphasis added]

CR 94, Exhibit H, is an internal document of Amana dated April 5, 1978, which gives a clear picture of the workings behind the scenes. Amana has received a serial number on merchandise shipped to San Antonio and which has "resulted in an extremely bad situation", namely, free market pricing. The memo ends with suspicions as to the offending dealer and an indication of retaliation:

> If Dee's is the culprit again, this will require some strong action."

CR 94, Exhibit I is another internal Amana document dated May 1, 1978, requesting that a new form be devised to insure the effectiveness of Amana's merchandise-tracing program because:

> We have had instances lately where the distributor finds out the source of the product, then wonders why we aren't doing something about it.

The clear import is that Amana wanted to act on reports from its distributors. As the evidence shows, Amana did do so on a number of occasions, thus vigorously enforcing its price-maintenance program.

The most dramatic way Amana dealt with non-complying retailers was to have its distributors cancel them. This, of course, isolated Amana from any wrongdoing, and distributors were more than willing to protect Amana's interests. This is borne out dramatically in CR 94,

Exhibit J, a letter to Amana from its Phoenix distributor dated June 22, 1978.

This exhibit deals with a dispute between two distributors involving a retail account called La Belles. The situation is similar to that involving Dillard's discussed above, where a multi-outlet retailer is able to sell below prevailing levels. The letter is important for the action that Amana took and the way its distributor sought to conceal it:

> We have discontinued selling La Belle's at the factory's insistence, although we have a very good commercial relationship with this account in Arizona.
>
> * * *
>
> "It is clear in the minds of all those concerned that we were never asked not to sell to La Belles."

There can be no doubt about the motivation for distributors reporting existence of transshipped product in their areas and Amana's concern for the problem as well. The problem was discounting Amana products, and the distributors were doing everything they could to stop it, to keep their other retail dealers happy. This is borne out by CR 94, Exhibit K, a June 27, 1978 letter from a Michigan distributor to Amana, enclosing a newspaper advertisement listing an Amana radarange at far less than the prevailing retail price. The writer states:

> "Dan, I was shocked to hear you say that you knew nothing about this situation. I talked by phone with Amana three times regarding this, once to you and twice to John Gerard, and had hoped that this situation had been handled by this time.
>
> "Will you please give this your immediate attention as this situation is very embarrassing for us with our authorized dealers."

The La Belles' problem did not end when Amana had its distributor in Phoenix cut off La Belles. Amana took additional measures. CR 94, Exhibit L, is a letter dated July 5, 1978, to Amana from one of its distributors complaining about La Belles' continued discounting of Amana radaranges. It states:

> "As per your instructions, we are attempting to purchase as many units as possible, but it appears as though they have an unlimited supply.
>
> Help We're getting hammered! Our Albuquerque Radarange business is going downhill fast. Any more suggestions?

Thus, Amana tried to buy the discounted merchandise off the market in order to stabilize prices.

The Michigan distributor was one of the more emphatic in his complaints to Amana about discount pricing in his area. See CR 94, Exhibits M and N. This prompted an emphatic response from Amana. Exhibit N bears the handwritten notation.

> "Ken Grabinski
>
> "didn't you get into this. Did Dave Wick get the transshipper guy to shut off these clowns.
>
> "I need to reply to Bob."

Amana records indicate that dealers continued to complain about discounting through the 1970's. One relatively recent series of complaints involved another California dealer. CR 94, Exhibit Q, is an Amana memo dated September 27, 1979, requesting an inquiry into the operations of a Los Angeles catalog house. The memo ends:

> Could you check this out please? There are obvious problems with service, etc."

The real, obvious problem referred to was price, not service, and that is why a copy of the offending company's price list was enclosed with the memo.

CR 94, Exhibit R, is a completed company form entitled "Regional Sales Manager's Semi-Annual Distributor Report" that was widely utilized by Amana. The report evidences Amana's policy of enlisting its distributors to police retail pricing, thus insuring compliance by all retail dealers. This particular report states at the bottom of page 4:

> "Attach a copy of Distributor's price list. Do you work with distributor on his *dealer* pricing? Attach all current programs Distributor is using.
>
> "Yes—uses all programs verbatim and *Iowa dealers prices.*" [Emphasis added]

Complaints from distributors about discounted product in their territories continued to be emphatic. CR 94, Exhibit S, an Amana document, records one such complaint from a distributor named Roy:

> "This SOB should be cancelled"—Roy will call Dan McConnell . . . to talk about this problem.

Amana also enlisted the aid of surreptitious "interviewers" to police the pricing of Amana products. CR 94, Exhibit T, is an Amana document entitled "Blind Shopping —Interview Instructions." It states, in pertinent part:

> "1. Tape recorder, condensor mike cannot be in view! Respondent *not* to know you are taping. New Hampshire cannot use! Important to set the highest recording volume."
>
> "2. Amana radarange *was* listed in the catalogue at $399.95"

"7. Where possible—*without* the salesman's knowledge—obtain a serial number of the Amana model on display."

Thus, Amana, its distributors, and its retail dealers all work in concert to stabilize prices. The effect was a system in which retail dealers were assured stable prices and generous margins. Deviations from the pricing scheme were dealt with surely and swiftly.

It is against this background that the plaintiffs opened a retail appliance store in Sacramento, California, under the name Filco in the early 1970's. A few years later Filco became an authorized Amana dealer. (CR 94, A. Saca, pp. 58, 59.) Filco dealt with Amana through Amana's sales representative, Martin Dusa, who was responsible for enlisting Filco as an Amana dealer. (CR 94, G. Karadsheh, pp. 33, 34, 35, 37).

In Filco's first meetings with Martin Dusa, when he was doing everything he could to enlist Filco as an account, he was duty-bound to announce Amana's policy against discounting. (CR 94, A. Saca, p. 59; G. Karadsheh, p. 40). For Martin Dusa was already receiving complaints about Filco's pricing from two other Amana accounts, defendants Lamco and Boulevard. Martin Dusa told his wife, Viola Dusa, about these complaints, and she, herself, overheard them on one occasion. (CR 94, V. Dusa, pp. 13, 14).

Lamco and Boulevard reacted immediately to Filco's presence in the market. This is easily understood in light of the fact that they had both operated in a market without true competition for many years. They had enjoyed the protection of California fair trade laws and did not have to concern themselves with price competition. Lamco and

Boulevard further enjoyed a close business relationship unknown in truly competitive markets. The principals of Lamco and Boulevard know each other "very well, business-wise only," bought Amana products from each other, and operated in close geographical proximity within Sacramento. (CR 94, C. Coppin, pp. 17, 38, 39; C. Rich, pp. 6, 7)

Lamco's and Boulevard's pricing policies were identical in the period in question. Contrary to Amana's denials, dealer price sheets were routinely mailed to Lamco and Boulevard and were utilized as a basis for pricing. (CR 94, C. Rich, p. 38-40; C. Coppin, pp. 5-6). These price lists provided for a uniform retail price on all Amana products throughout the United States. (CR 94 Whittle, p. 31).

Lamco and Boulevard had eliminated price competition between themselves by utilizing the suggested retail prices furnished by Amana with the knowledge that other dealers were doing the same. Lamco and Boulevard followed the Amana retail prices. They did not produce any retail price lists for the period in question other than the Amana price lists containing uniform prices. The clear import is that Lamco and Boulevard were charging in accordance with the Amana lists. See CR 94, Exhibits M. V, and W.

Lamco and Boulevard were insured of compliance with suggested pricing by simply going to competitor's stores to check their pricing. Dealers routinely post firm prices on Amana products. Filco did not do this, and thus Lamco and Boulevard could not be assured of compliance by Filco.

Messrs. Rich and Coppin, the principals of Boulevard and Lamco, respectively, were highly aware of Filco's discounting and reacted accordingly. They could not conceal

their reactions to Filco in view of overwhelming documentary evidence. (CR 94, C. Rich, p. 21; CR 40, C. Coppin, p. 35).

The complaints and request for corrective action were directed first to Martin Dusa, the Amana representative with responsibility for overseeing Filco's pricing. The complaints eventually reached the top men in the branch office, Messrs. Fretter and Whittle, and the plaintiffs were frequently confronted and seriously admonished.

Rose Karadsheh, who worked as a salesperson in the Filco store for a time, recounted one incident when a representative of Lamco, masquerading as a customer, put a down payment on Amana merchandise and received a receipt showing the discount price then being offered by Filco. The receipt was turned over to Martin Dusa an undeniable proof of Filco's discounting with further requests for corrective action. (CR 94, R. Karadsheh, pp. 16, 31-33; G. Karadsheh, p. 41).

The extent of the pressure brought to bear by Lamco and Boulevard is revealed best by Viola Dusa, Martin Dusa's widow. Mrs. Dusa was interested in her husband's work, made sales calls with him, and was privy to much of the day-to-day contact Mr. Dusa had with Amana dealers. The picture presented by Mrs. Dusa is one of vehement opposition to Filco by its competitors Lamco and Boulevard. This resulted in Filco's eventual cancellation as a dealer.

Mrs. Dusa overheard telephone conversations her husband had with Coppin and Rich and discussed these calls with her husband. Coppin and Rich complained repeatedly

to Mr. Dusa regarding Filco's discounting. Mrs. Dusa understood Lamco was threatening to stop buying Amana products if Amana continued to deal with Filco. On one occasion Coppin was "yelling". (CR 94, V. Dusa, pp. 14, 18, 24, 52, 55).

Moreover, the complaints reached the Amana branch and had the desired effect. Mrs. Dusa, on cross-examination at pages 28-30 of her deposition.

> Q. Do you even remember any discussions or your husband ever saying what Mr. Fretter's [Amana's] response was at any time to your husband's request that Filco be signed up?
>
> A. Well, it just seemed like they were objecting?
>
> Q. Amana was?
>
> A. Yes.
>
> Q. Did he say why?
>
> A. Because of the pressure that Lamco and Boulevard were saying that—that—well, like I say, the sales policies of Filco—
>
> Q. Now—
>
> A. —would probably be objectionable.
>
> Q. And your husband told you this—reason I'm asking, you started out that sentence with, "It seemed," and what I want to know is how you got that opinion.
>
> A. Yes. That's what the conversations were about. That's what they talked about, is because Lamco was definitely saying that Filco would sell for less and how could he do that with Amana.
>
> Q. Okay, Now, is this his conversations with Lamco or his conversations with Amana?
>
> A. Well, that would be what Lamco would say to my husband.

Q. Right. Right. What I'm interested in is, what you know, if anything, as to Amana's response to your husband when he called them up, for example, and said, "I would really like to make Filco a dealer; they're going to sell a lot of appliances."

A. I don't know of any specific conversation. It's just the whole matter seemed that they—they weren't as happy to make him a dealer as they should have been, or may be someone else who was applying to be a dealer." (CR 94, V. Dusa, pp. 28-30).

Thus, pressure was exerted directly on Filco by Lamco, and on Amana by both Lamco and Boulevard. Amana itself then brought additional pressure to bear on Filco. Filco received the suggested retail price lists in the mail and were instructed by Martin Dusa to price in accordance with them. (CR 94, G. Karadsheh, pp. 42, 43). Martin Dusa admitted that in the relevant period, Boulevard and Lamco were both selling at these suggested retail prices and conveyed this fact to Filco. (CR 94, G. Karadsheh, p. 53). Finally, Mr. Dusa made clear to Filco that Boulevard and Lamco were threatening to boycott Amana if Amana continued to sell to Filco. (CR 94, G. Karadsheh, pp. 51, 74).

Mr. Saca of Filco also received pressure from Amana not to discount. His testimony in this regard is strikingly similar to Mr. Karadsheh's. Martin Dusa said Lamco might boycott Amana if Filco continued to discount. Mr. Dusa confronted Mr. Saca with price complaints from Coppin of Lamco. (CR 94, A. Saca, pp. 89, 90).

These complaints and pressures reached the branch office. Mr. Whittle, the branch manager, reluctantly admitted this at page 81 of his deposition that they did:

Q. Are you aware of any complaints made to Amana by competitors of Filco?

A. I am not aware, no.

Q. About any aspects of Filco's business?

Ms. Robinson: I would object, asked and answered.

The Witness: I would like to go back to the answer. I apologize. When I say Amana—I am well trained—Amana is the corporate office.

Q. Mr. Alioto: Okay.

A. So, I maybe answered too quickly. Amana is not aware of anything.

Our branch, I have heard, especially toward the end of this situation, that there were complaints, yes. (CR 94, Whittle, p. 81).

It was at this point in March of 1976, that Martin Dusa died of a heart failure. It had been documented in an unrelated proceeding for workman's compensation benefits that Mr. Dusa's death was precipitated by stress over the Filco situation. In March 1976, Filco was still under contract with Amana and desired to continue selling Amana products after Mr. Dusa's death. However, in the period after Martin Dusa's death, Filco was ignored, and almost all relations between Filco and Amana ceased. Filco took considerable steps to restore relations, and Amana eventually dispatched a new dealer representative to Filco. (CR 94, Whittle, pp. 76-77).

The new dealer representative's name was Gary Casimir. He did not visit the Filco store until October of 1976. During this visit, Casimir was quite emphatic in his demands that the Amana line not be discounted and made it clear that Filco would not get the line unless they agreed not to dis-

count. Casimir himself admitted that pricing may have been discussed at this meeting. (CR 94, G. Karadsheh, pp. 56, 79; G. Casimir, p. 60; A. Saca, pp. 102, 123, 124).

During the course of this meeting, another dealer representative who happened to be in the Filco store began to mimic Casimir's insistence on pricing and other demands, and this apparently angered Casimir. Casimir told Jess Karadsheh he didn't want any other dealer representatives in the store the next time he visited. Jess Karadsheh objected that Casimir was overstepping his authority in demanding this, and an altercation ensued. Casimir stormed out of the store and tore a large order for Amana products which Jess Karadsheh had given him.

What happened in the wake of this meeting explains it best. Casimir reported the incident to his superior, Ernie Fretter, in the Amana branch office. Oddly, "Ernie just kind of laughed and said 'Good job'." (CR 94, G. Casimir, p. 34). In a moment of absolute candor, Casimir reflected on this conversation with Fretter, at pages 61 and 62 of his deposition:

> Q. All right. I believe in your earlier testimony, when you were describing the incident in October of 1976, you related that you discussed this with Mr. Whittle after the event, and he replied to you, quote, "You did a good job"?
>
> A. Correct. That was Ernie Fretter, not Mr. Whittle.
>
> Q. I beg your pardon. And he, I take it, replied, "You did a good job." What did you understand him to mean, if anything?
>
> A. I would interpret that as saying that, "You have Filco mad at us. Now we don't have to worry about him

any more." And I would assume that he was relieved that maybe this problem had been settled, finally.

Q. And when you refer to Filco as a "problem", again, what sense do you mean that they were a problem?

A. Well, with the pricing practices and their basically upsetting the rest of the dealer structure.

Q. Basically upsetting the rest of the dealers price structure?

A. Price structure, and settle the dealers down, basically, from their complaining about Filco and its [sic] pricing policies. (CR 94, Casimir, pp. 61-62).

Filco thereafter exhausted all possible efforts at reinstatement as an Amana retailer, but to no avail. (CR 94, A. Saca, pp. 104, *et seq.*). The parties never dealt again, and Amana has never given any reason for its refusal to deal to this day. It is certainly curious that Amana would cease to deal with a substantial account in a fast-growing market. Casimir himself attested to the demand for Amana products by appointing approximately fifteen new dealers during his short tenure. (CR 94, G. Casimir, p. 64). Quite simply, there was no legitimate business reason for the cancellation of Filco. Mr. Whittle's deposition testimony at page 73 is dramatic proof of that:

Q. Mr. Alioto: If the present lawsuit were not pending against Amana, is there any reason you can think of why you would not sell Filco Amana products for retail sale?

A. No reason that I can think of. (CR 63, Whittle, p. 73).

B. The Rulings Below

The district court ruled that there were insufficient evidence as a matter of law from which a jury could infer that Filco was cancelled as the result of concerted action by Amana, Lamco, and Boulevard designed to stabilize prices. The Ninth Circuit affirmed, stating there was no direct evidence that the cancellation of Filco was the result of the pricing complaints. (Appendix B, p. 24).

The Ninth Circuit noted in its opinion that "even if some of the memoranda are viewed as relating to potential price fixing, they are merely isolated incidents and do not amount to evidence of a nationwide pricing conspiracy." (Appendix B, p. 27). The Court apparently applied a balancing test in deciding to keep this evidence from the jury: "Courts must balance their duty to protect manufacturers or suppliers from vexatious litigation with their responsibility not to usurp the jury's function as factfinder." (Appendix B, p. 28, footnote omitted).

CERTIORARI SHOULD BE GRANTED IN ORDER TO RESOLVE THE CONFLICT BETWEEN THE POSITION OF THE SECOND, THIRD AND NINTH CIRCUITS AND THAT OF THE SEVENTH AND EIGHTH CIRCUITS AS TO WHETHER A SHERMAN ACT CONSPIRACY MAY BE IMPLIED AS A MATTER OF LAW WITHOUT PROOF OF AN AGREEMENT OR A CONTRACT

This case presents a conflict in the circuits that has arisen subsequent to, and because of, the decision in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

Since *GTE Sylvania* was decided there have been numerous circuit court decisions examining anew the issue of what constitutes a vertical conspiracy under Section 1 of the Sherman Act.[2] Some of the courts have read *GTE Sylvania* as eliminating a large portion of vertical conspiracy cases. They have read *GTE Sylvania* this way despite the fact that the case dealt primarily with the Rule of Reason treatment of conspiracies rather than with the definition of concerted action. This misreading has resulted in new and stringent requirements for proof of concerted action. The Second, Third and Ninth Circuits have followed such a course.

In this case, the Ninth Circuit stated: (a) Amana was aware of dealer complaints about Filco's pricing (Appendix B, p. 18); and (b) plaintiffs' evidence might be viewed as "relating to potential price fixing" (Appendix B, p. 27). Moreover, Filco has continually argued that there was no evidence of any business reason for its termination and the Ninth Circuit did not address this point. Nonetheless, the

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[2]*See, e.g.*, Second Circuit: *Oreck Corp. v. Whirlpool Corp.*, 693 F.2d 75 (2d Cir. 1980); *Borger v. Yamaha Int'l. Corp.*, 625 F.2d 390 (2d Cir. 1980); *H. L. Moore Drug Exchange v. Eli Lilly and Co.*, *cert. denied*, ... U.S. ...; *Venture Technology, Inc. v. Nat'l Fuel Gas Co.* ... F.2d ... No. 81-7069 (2d Cir. July 26, 1982); *Schwimmer v. Sony Corporation*, 677 F.2d 946 (2d Cir. 1982) *cert. denied*, ... U.S. ....

Third Circuit: Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164 (3d Cir. 1979); *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981).

Seventh Circuit: Spray-Rite Service Corp. v. Monsanto Corp., 684 F.2d 1226, 1982-2 Trade Cas. [CCH] ¶ 64,808 (7th Cir. 1982); *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, ... F.2d ...., 1982-2 Trade Cas. [CCH] ¶ 64,744 (7th Cir. 1982).

Eighth Circuit: Battle v. Lubrizol Corp., 673 F.2d 984 (8th Cir. 1982).

Ninth Circuit held as a matter of law that a jury could not find that Filco was cancelled because of the pricing complaints of competitors (Appendix, p. 24).

The *Filco* holding conflicts with recent decisions in the Seventh and Eighth Circuits. The Seventh Circuit, in *Spray-Rite Service Corp. v. Monsanto Co.*, 684 F.2d 1226 (7th Cir. 1982) held that a vertical "combination or conspiracy" is still implied as a matter of law in the fact pattern presented here. The *Spray-Rite* court upheld a jury finding that Monsanto had "conspired with some of its distributors to fix the resale price of Monsanto herbicides," i.e., a "general conspiracy" of the same nature as that in *Filco*:

> Monsanto argues that evidence of price complaints coupled with evidence of termination in response to those complaints is insufficient to prove the existence of a resale price maintenance agreement. It relies on *Edward J. Sweeny & Sons, Inc. v. Texaco, Inc.*, [3rd Cir.] . . .
>
> . . . In *Battle v. Lubrizol Corp.* . . . , the Eighth Circuit declined to follow *Sweeny* and held that "proof of a dealer's complaints to the manufacturer about a competitor dealer's price cutting and the manufacturer's action *in response* to such complaints would be sufficient to raise an inference of concerted action." *Id.* at 991 (emphasis in original). We agree. 684 F.2d at p. 1238-39.

The Eighth Circuit so held in *Battle v. The Lubrizol Corp.*, 673 F.2d 984, 991 (8th Cir. 1982). As the *Battle* court emphatically stated:

> [W]e do not agree that 'even if appellants had demonstrated that Texaco's actions were in response to these

> complaints, such evidence would not show the necessary concerted action. 673 F.2d at 991.

In this case, the Ninth Circuit explicitly agreed with the Third Circuit's holding in *Edward J. Sweeny & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105 (3d Cir. 1980), *cert. denied* 451 U.S. 911 (1981). [Appendix B, p. 7]. *See also Schwimmer v. Sony Corporation*, 677 F.2d 946 (2d Cir. 1982). Thus, three circuits now require more than a casual link between complaints and response in order to establish a conspiracy.

The position adopted by the Second, Third and Ninth Circuits runs counter to Supreme Court decisions. Under this Court's precedent, Section 1 does not require proof of any agreement; rather, the law implies a "combination or conspiracy" when a manufacturer, for anticompetitive reasons, takes action to limit discounting in response to customer requests for such action. *See United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960):

> "[A]n unlawful combination is not just such as arises from a price maintenance *agreement*, express or implied; such a combination is also organized if the producer secures adherence to his suggested prices by means which go beyond his mere declination to sell to a customer who will not observe his announced policy." 326 U.S. 43.

See also Albrecht v. Herald Co., 390 U.S. 145 (1968); *Simpson v. Union Oil of California*, 377 U.S. 1 (1964); L. Sullivan, *Handbook of the Law of Antitrust* § 139 (1977).

The Second, Third and Ninth Circuits have thus added one further requirement to this formulation: that of a contract or similar agreement. In so doing, those circuits

have also rejected the long line of conspiracy decisions based upon a manufacturer's "mere receipt of complaints."[3] Historically, these decisions held that something more than the receipt of complaints was needed in order to establish a "combination". Complaints and responsive action were, in accordance with this Court's teaching, held to constitute the necessary proof as a matter of law. Under the Ninth Circuit's ruling, this fundamental conspiracy principle has been effectively nullified.

The effect of the Ninth Circuit's approach is sharply illustrated by the fact that the court was able to disregard undisputed evidence of price fixing. Amana's requirement that Filco price in accordance with the price list, and Filco's coerced acquiescence for a time, was disregarded by the court.

The additional proof requirements imposed by the Ninth Circuit permitted the court to ignore other dispositive proof of price fixing in *Filco*. The Ninth Circuit distinguished its own leading decision in *Girardi v. Gates Rubber Co. Sales Division, Inc.*, 325 F.2d 196 (9th Cir. 1963) primarily on the quality of the evidence presented, namely, written evidence as opposed to the oral evidence presented in Filco. This artificial distinction allowed the court to overlook the fact that Amana has never offered a business

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[3]*See, e.g., Modern Home Institute v. Hartford Accident & Indemnity Co.*, 513 F.2d 102 (2d Cir. 1975); *Westinghouse Electric Corp. v. CX Processing Laboratories*, 523 F.2d 688 (9th Cir. 1975); *Klein v. American Luggage Works*, 323 F.2d 787 (3d Cir. 1963); *Baer v. Esprit de Corp.*, 1980-81 Trade Cas. [CCH] ¶ 63,614 (N.D. Cal. 1980); *A. G. Rogers Co. v. Merck & Co.*, 498 F.Supp. 5 (E.D. Tenn. 1980).

explanation for its refusal to deal with Filco in the wake of pricing complaints.

This conflict among the circuits concerns an important and heavily-litigated issue. *See* P. Areeda, *Antitrust Analysis* 553 (2d Ed. 1974). It also reflects a drastic shift in the federal courts' role as factfinder. Where before it was for the jury to find "combinations or conspiracies" from inferential proof, now they will only be allowed to perform this function after the court has analyzed and weighed the evidence.

It is rare in today's sophisticated business environment to find written contracts or correspondence directly acknowledging price fixing. Indeed, most participants in such schemes employ elaborate devices to avoid detection. Moreover, much documentation if often discarded long before litigation as the result of document destruction programs. Such a program was utilized by Amana here and resulted in the destruction of much evidence after the filing of suit (CR 118, Aamodt, p. 15: 13-22; p. 33:15; p. 34:9). If this issue is not resolved, it will be the law that a manufacturer may fix resale prices as long as it does not enter into formal contracts or agreements with its customers in so doing.

We respectfully submit that a writ of certiorari should be granted. The issue has received significant recent attention from a number of circuits and is ripe for review. The foundations of the Sherman Act should not be permitted to be undermined. *See American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, ... U.S. ....., 72 L.Ed. 2d 330, 342-43 (1982).

CONCLUSION

Petitioners respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

By: MARIO N. ALIOTO
Counsel for Petitioners
Filco, et al.

(Appendices follow)

Appendix A

In the United States District Court
For the Eastern District of California

Civil No. S-78-557 MLS

Filco, a California partnership, et al.,
Plaintiffs,

vs.

Amana Refrigeration, Inc., a Delaware corporation, et al.,
Defendants.

[Filed August 19, 1981]

ORDER

This federal and state antitrust action, with related state causes of action, is presently before the court on defendants' motions for summary judgment and plaintiffs' motions for permission to file a second amended complaint and a supplemental complaint. The issues have been extensively briefed and argued orally, and were thereafter submitted on June 19, 1981 for decision, although additional written arguments were submitted thereafter by both sides and considered by the court.

I. *Nature of the Action.*

The amended complaint (hereinafter "complaint"), filed January 17, 1980, is framed in seven counts, as follows:

Count One. Alleged violation of Section 1 of the Sherman Act (15 U.S.C. § 1)[1] by all three named

[1]Initially plaintiffs alleged violations of both Section 1 and Section 2 of the Sherman Act, but have since withdrawn their claim of the Section 2 violation.

defendants—Amana Refrigeration, Inc. ("Amana"), Lamco Appliance, Inc. ("Lamco"), and Boulevard TV & Appliance, Inc. ("Boulevard"), wherein it is charged, inter alia, that the defendants and others unnamed conspired to fix and maintain minimum retail prices for Amana's products and to refuse to deal with plaintiffs in retaliation for their refusal to adhere to such fixed prices.

Count Two. Alleged violation of California's Cartwright Act (California Business and Professions Code § 16720 et seq.), by defendants Amana, Lamco and Boulevard, charging the same conduct as allegedly constitutes a violation of the Sherman Act, constituting a pendent state claim.

Count Three. Alleged breach by defendant Amana of the implied covenant of good faith and fair dealing inherent in the alleged franchise or dealership agreement between Amana and plaintiffs, resulting in refusal by Amana to sell to plaintiffs, constituting a further pendent state claim.

Count Four. Alleged breach by defendant Amana of its alleged fiduciary duty to plaintiffs in refusing to sell to plaintiffs, constituting a further pendent state claim.

Count Five. Alleged breach by defendant Amana of alleged written and oral dealership agreements between Amana and plaintiffs in refusing to sell to plaintiffs, constituting a further pendent state claim.

Count Six. Alleged fraud by defendant Amana in making negligent misrepresentations of fact to plain-

tiffs concerning plaintiffs' status and relationship with Amana, constituting a further pendent state claim.

Count Seven. Alleged cause of action against defendant Amana on a theory of promissory estoppel arising from Amana's alleged unfulfilled promise to supply plaintiffs with Amana products, constituting a further pendent state claim.

A review of these seven causes of action reveals that they are but seven alternative legal theories under which relief is sought for Amana's refusal to continue to deal with plaintiffs by way of furnishing products to plaintiffs for resale. The antitrust causes of action, Counts One and Two, also name Lamco and Boulevard as defendants on the theory that they are competitors of plaintiffs who conspired with Amana to fix prices and to cause the termination of plaintiffs as an Amana retailer.

The proposed new eighth and ninth counts, which plaintiffs seek to add by their proposed second amended complaint, would likewise articulate additional alternative legal theories for relief because of the refusal of Amana to deal with plaintiffs, both of which are also pendent state claims. Proposed Count Eight alleges a violation of California Business and Professions Code Section 17200 (unfair competition) on the part of all three defendants; propsed Count Nine alleges intentional and negligent interference by defendants Lamco and Boulevard with the contractual relationship between Amana and plaintiffs, and intentional and negligent interference with plaintiffs' business relations with their customers by defendants Lamco and Boulevard.

The proposed supplemental complaint alleges and seeks the recovery of damages accruing after the filing of plain-

tiffs' original complaint herein from acts occurring both before and after such filing.

The fact situation, in essence, as alleged by plaintiffs is that defendants combined and conspired to maintain minimum resale prices on Amana products by policing the resale prices charged by Amana retailers, attempting to coerce plaintiffs to resell Amana products at set prices, threatening plaintiffs with cancellation if they refused to abide by the set price, and cancelling and thereafter refusing to deal with plaintiffs because of plaintiffs' refusal to adhere.

II. *The Relief Sought.*

A. Plaintiffs seek to amend the complaint to substitute a corporate entity, Filco, Inc., as sole plaintiff in the place and stead of the partnership and the four individuals now named as plaintiffs and to add the eighth and ninth causes of action hereinabove described.

B. Defendant Amana asks for summary judgment as to Counts One, Two, Four and Seven, and further asks that if such request is granted as to Counts One and Two, the court dismiss Counts Three, Four, Five, Six and Seven on the ground there will no longer be any federal cause of action before the court.

C. Defendants Lamco and Boulevard ask for summary judgment as to Counts One and Two.

D. All defendants oppose the allowance of any of the requested amendments (except the substitution of the corporation as the new plaintiff) and likewise oppose the filing of the supplemental complaint.

III. *Summary of Facts.*

In late 1974 or early 1975 plaintiffs, the owners and operators of a retail discount appliance business, began ordering and receiving Amana products for resale.[2] These orders were placed direct with Amana representatives (company employees) rather than with intermediate distributors or wholesalers.[3] Initially plaintiffs dealt with one Martin Dusa, the Amana representative in this area, until his death in March 1976, following which plaintiffs simply called in their orders to Amana and received deliveries in accordance therewith.

In October 1976 one Gary Casimir, the Amana area representative succeeding Dusa, called at plaintiffs' store at plaintiffs' request to discuss future orders with Ghazi Karadsheh (plaintiffs' representative). Casimir and Karadsheh are in disagreement as to what was said at this meeting, but there is no dispute that the discussion ended in an angry exchange culminating in Casimir tearing up plaintiffs' order, leaving the store premises and refusing to sell thereafter to plaintiffs. It is also undisputed that when plaintiffs contacted Casimir's superior (Fretter) in an effort to patch up their business relationship with

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[2]The facts appear to be in dispute as to whether in early 1976 plaintiffs entered into a written dealership or franchise agreement with Amana or simply continued to be casual purchasers from Amana. The legal questions addressed in the motions for summary judgment on the antitrust causes of action are the same regardless of which relationship existed.

[3]Although Amana sold to retailers through independent distributors in some parts of the country during the period 1974 to 1976, such was not the case in the Sacramento area where sales were made direct by Amana distributors to the retailers.

Amana, Fretter stated that Amana would back Casimir's decision. As a result, Amana discontinued selling to plaintiffs at that time and has never resumed doing so.

IV. *The Antitrust Causes of Action.*

It is plaintiffs' contention that Amana's refusal in October 1976 to continue to sell to them was a refusal to deal in retaliation for plaintiffs' refusal to adhere to the "suggested" resale prices, in violation of Section 1 of the Sherman Act and the Cartwright Act. In attempting to determine whether any triable issues of fact are presented by this claim, after having allowed plaintiffs ample time to ascertain the underlying facts through extended discovery, the court must first address the question of whether there is any competent evidence from which a trier of fact could reasonably infer the existence of a "contract, combination, . . . or conspiracy," since individual conduct, no matter how anticompetitive or otherwise reprehensible, will not constitute a violation of Sherman I. *United States v. Colgate,* 39 S. Ct. 465 (1919); *United States v. Parke, Davis and Co.,* 80 S. Ct. 503 (1960). Such an agreement or conspiracy can be inferred from circumstantial evidence since direct evidence thereof is seldom available. (*See Interstate Circuit, Inc. v. United States,* 59 S. Ct. 467 (1939), which notes various factors from which a prohibited combination or conspiracy can be inferred, including knowledge that concerted action in a scheme is contemplated or invited, uniform acquiescence or participation in that scheme, a course of conduct in sharp contrast to past practices, a common motive to promote the participants' anticompetitive self-interest, a failure by the defendants to explain a parallel course of conduct as anything other than a conspiracy.)

Plaintiffs assert, first, that an *Albrecht*[4] combination can be inferred from the evidence adduced by affidavits and depositions. This contention cannot be substantiated. There is no testimony, from or on behalf of plaintiffs or from any other source, that Amana ever threatened to terminate or otherwise punish plaintiffs if they did not adhere to the suggested resale prices; on the contrary, the evidence uniformly establishes that there were no such threats. Moreover, plaintiffs themselves allege that a dealership agreement was signed between them and Amana in early 1976 notwithstanding that plaintiffs' practice had been to sell Amana products at substantially discounted prices. The evidence relating to "coercion" consists of plaintiffs' testimony that Dusa requested that plaintiffs "try to keep it down as far as prices because I have Lamco and Boulevard on my back . . . I don't want to lose their accounts, you know;" that Amana circulated suggested retail price lists; that Dusa told plaintiffs to "keep a low profile" with the prices and not advertise the discounts. The aggregate of this evidence cannot be construed to amount to coercion.

There is a similar absence of evidence as to actual acquiescence on the part of plaintiffs in the suggested resale prices. Although plaintiffs call attention to the deposition

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[4]In *Albrecht v. Herald Co.*, 88 S. Ct. 869 (1969), the Court observed in footnote 6, that the required "combination" can occur in a vertical resale price maintenance case if a plaintiff (distributor) unwillingly acquiesces in the coercive demands of the publisher (manufacturer) to maintain the latter's suggested resale prices. In order for such a combination to exist, there must be both coercion and actual acquiescence in response to such coercion. *See also, Simpson v. Union Oil Co.*, 84 S. Ct. 1051 (1964); *United States v. Parke, Davis and Co.*, 80 S. Ct. 503 (1960); *Chisholm v. International Harvester*, 498 F.2d 1139 (9th Cir. 1974).

testimony of Ghazi Karadsheh wherein he answered "Yes" to the question "And with certain exceptions was that [suggested price] also the price at which Filco marketed Amana products?", plaintiffs themselves have contradicted such evidence in the deposition of Anton Saca, one of the plaintiffs, who testified that they did not follow the suggested resale price list, that he does not believe they ever sold at Amana's suggested prices, and that their prices were set by "competition" which was usually lower than the suggested resale prices.

Plaintiffs contend, next, that there is evidence from which a conspiracy can be inferred among Amana, Lamco and Boulevard to maintain minimum resale prices. The court can find no competent or admissible evidence in the affidavits or deposition testimony to support such an inference. The owners of Lamco and Boulevard (Coppin and Rich, respectively) both testified that they did not follow Amana's suggested resale prices and plaintiff Anton Saca acknowledged in his deposition that neither Lamco nor Boulevard was adhering to Amana's suggested prices—although he went on to say that plaintiffs were discounting Amana's suggested prices considerably more than were Lamco and Boulevard. Indeed, the only suggestion that Lamco and Boulevard were adhering to Amana's suggested prices was the inadmissible hearsay testimony of plaintiffs' Ghazi Karadsheh that Dusa told him that Lamco and Boulevard were adhering to Amana's suggested prices. This can scarcely be called evidence sufficient to support an inference of conspiracy to maintain fixed minimum prices.

Plaintiffs assert, finally, that there is evidence to support an inference of a horizontal conspiracy by Lamco and

Boulevard to fix minimum prices for Amana products which they implemented by prevailing upon Amana to terminate plaintiffs as a retailer of Amana products. Plaintiffs are unable to identify any evidence which, if true, could reasonably support an inference that Lamco and Boulevard conspired or combined to fix prices in Amana products or to eliminate plaintiffs as an Amana retailer. In fact, there is nothing before the court to suggest that Lamco and Boulevard were marketing Amana products at the same prices.

Similarly, there has been no evidence presented to indicate that either Lamco or Boulevard was able to induce Amana to terminate plaintiffs, either because of the plaintiffs' discounting practices or for any other reason. There is no known admissible evidence that Boulevard ever complained to Amana about plaintiffs' discounting or other practices. Lamco, on the other hand, did so complain; both Casimir and Fretter of Amana testified that they received such complaints from Coppin of Lamco, but they denied taking any action with respect to the complaints.

Plaintiffs rely heavily on *Girardi v. Gates*, 325 F.2d 196 (9th Cir. 1963), wherein the court held that a reasonable inference of an illegal combination could be drawn where a price-cutting distributor was terminated by the manufacturer after receiving complaints from a competitor of the distributor. The court noted (p. 202):

> If Oranges [plaintiff's competitor] complained, it would be a fair inference that his complaint was designed to get some action on the part of Gates [manufacturer]. The very act of complaining carries the meaning "I want you to do something about it."

However, the evidence in *Girardi* was considerably stronger than what is presented here. In *Girardi,* one of the manufacturer's salesmen had threatened the plaintiff with termination if he did not cease discounting within 30 days, and this threat was in response to the competitor's complaints; there was evidence that the salesman took the competitor's complaint seriously and although he had not decided to move "against the situation," he wanted management's thoughts on the subject; there was a letter from the defendant's district manager to the salesman concerning another prospective distributor about whom Oranges had also complained, indicating that he had explained to Oranges that if the new distributor handled Gates products it could be expected that Gates would exercise control over his marketing practices in such a manner as to avoid a "price eroding policy." Thus, the court held in *Girardi* that an inference could be drawn that Gates had a fixed policy of refusing to sell to those who did not adhere to suggested resale prices and that Oranges, when making the complaints about the plaintiff, knew of the policy and expected that Gates would exercise control over Girardi. As further circumstantial evidence, it was noted that the plaintiff was terminated in two geographical areas where he was discounting but was not, initially, terminated in a third area where he was not discounting.

In the present case there is no such circumstantial evidence which would justify a similar inference of unlawful combination. There is, in fact, no evidence to suggest that Amana had a resale price maintenance policy at all, or even that it would unilaterally and *lawfully* refuse to deal with those who sold at less than the suggested prices.

Although Lamco might have hoped for action by Amana when it complained about plaintiffs' prices, there is no evidence to suggest that it had any reason to expect that Amana would either exercise control over plaintiffs or terminate them. The mere fact that there were competitor complaints about plaintiffs and that plaintiffs were subsequently terminated is insufficient, standing alone, to support an inference that Amana was acting in response to the complaints when it effected the termination. A combination in restraint of trade cannot be implied from competitor complaints alone since it is the normal working of the marketplace for competitors to make such complaints. *Carbon Steel Products Corp. v. Alan Wood Steel Co.*, 298 F. Supp. 584 (S.D.N.Y. 1968). *See also Sweeney & Sons v. Texaco, Inc.*, 478 F. Supp. 243 (E.D. Pa. 1979), *aff'd* 637 F.2d 105 (3d Cir. 1980). *Cf. Westinghouse Electronics Corp. v. CX Processing Laboratories, Inc.*, 523 F.2d 668 (9th Cir. 1975).

The facts in the case *sub judice* much more closely resemble those in *Carr Electronics Corp. v. Sony Corp. of America*, 472 F. Supp. 9 (N.D. Cal. 1979), where the court granted the defendant's motion for summary judgment on the ground that

> the evidence upon which Carr relies is insufficient as a matter of law to support a reasonable inference that Sony conspired with Macy's or with any other dealer to terminate Carr in retaliation for Carr's discount pricing.

A final observation should be made with respect to plaintiffs' exhibits A through W attached to its memorandum of points and authorities in opposition to the defendants' mo-

tions for summary judgment. Plaintiffs contend that these exhibits are evidence which can well create an inference of the alleged unlawful combination. The argument is without merit. These exhibits, without exception, have no reference to dealings in the Sacramento area or dealings involving plaintiffs or Lamco or Boulevard. In fact, they do not relate to any possible resale price maintenance scheme; at most, they express a concern over the transshipment of Amana products between territories of independent distributors of Amana products. As previously noted, the allegations in this lawsuit involve an alleged (1) resale price maintenance scheme (2) in the Sacramento area (3) between Amana and its retailers. Exhibits A through W relate to dealings with independent Amana distributors in other parts of the United States and at later dates (with one exception) than are here involved; they add nothing to the affidavits and depositions.

In light of the court's conclusion that it must grant defendants' motion for summary judgment as to Counts One and Two of the complaint, there would appear to be no reason why it should retain jurisdiction of the case since the remaining counts (Counts Three through Seven) assert solely state law causes of action; moreover, at least some of these causes of action involve complex issues where state law may be in doubt and which are thus better addressed in state court. *United Mine Workers v. Gibbs,* 86 S. Ct. 1130 (1966). *If, therefore, the court grants summary judgment in favor of defendants in Counts One and Two and dismisses the remaining counts because they are no longer pendent to any federal claim, it will be unnecessary to address plaintiffs' motion to file a supplemental com-*

plaint, plaintiffs' motion to amend the complaint (except to substitute a new party-plaintiff), or defendant Amana's motion for summary judgment on Counts Four and Seven; these matters can be pleaded in state court when, presumably, the state law claims are presented to the state court.

Although counsel for plaintiffs have not addressed the question, the court notes that if it discretionarily dismisses the state claims on the ground that they are no longer pendent to any federal claim, plaintiffs might find themselves barred by various statutes of limitations from now asserting such claims in state court. Therefore, the court will defer its decision on whether to discuss Counts Three through Seven, and also its decisions on the remaining motions, pending an opportunity for counsel to brief and argue the propriety of the contemplated dismissal.

For the reasons set forth above, the court hereby ORDERS:

1. That plaintiffs' complaint may be amended to substitute Filco, Inc., a corporation, as sole plaintiff herein in the place and stead of the presently named plaintiffs, subject to plaintiffs' oral stipulation in open court that this action, in the name of such single corporate plaintiff, shall be deemed to include by assignment all similar claims of the plaintiffs presently named;

2. That the motions of defendants Amana, Lamco and Boulevard for summary judgment as to Count One (Sherman Act) and Count Two (Cartwright Act) of the complaint be, and they are hereby, granted *on the ground that the evidence upon which plaintiffs rely is insufficient as a*

matter of law to support a reasonable inference of the alleged conspiracy or combination;

3. That the court's rulings on plaintiffs' motion to add Counts Eight and Nine to the complaint, plaintiffs' motion to file a supplemental complaint, defendant Amana's motion for summary judgment on Counts Four and Seven, and defendant Amana's motion to dismiss Counts Three through Seven *shall be deferred pending a hearing on the propriety of dismissal of the pendent state claims;*[5] *that such hearing shall be held on October 30, 1981 at 9:00 a.m., after briefing in accordance with the following schedule:*

October 2, 1981—plaintiffs' opening brief;

October 16, 1981—defendant Amana's reply brief;

October 23, 1981—plaintiffs' closing brief.

4. That the currently scheduled pretrial conference date of August 31, 1981 and the trial date of September 14, 1981 are vacated; that the case will be re-set for pretrial conference and trial if it is determined that this court will retain jurisdiction.

Dated: August 19, 1981.

Milton L. Schwartz
United States District Judge

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[5]This hearing, together with the required supplemental briefing, will be vacated and cancelled upon notification by plaintiffs that they do not elect to request that this court retain jurisdiction over the state claims.

Appendix B

United States Court of Appeals
For the Ninth Circuit

No. 81-4604
D.C. No. C-S-78-557

Filco, a California partnership,
Anton J. Saca, Ilham Saca, Rose M. Karadsheh,
and Nahil Altenhofen,
Plaintiffs-Appellants,

vs.

Amana Refrigeration, Inc., a Delaware corporation;
Lamco Appliance, Inc., a California corporation and
Boulevard T.V. & Appliance, Inc.,
a California corporation,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of California
Milton L. Schwartz, District Judge, Presiding
Argued and Submitted September 14, 1982

[Filed June 10, 1983]

OPINION

Before: MERRILL, WALLACE, and NELSON,
Circuit Judges.

WALLACE, Circuit Judge:

Filco sued alleging that Amana Refrigeration, Inc. (Amana), Boulevard T.V. & Appliance, Inc. (Boulevard) and Lamco Appliance, Inc. (Lamco) conspired to fix prices

in violation of section 1 of the Sherman Act, 15 U.S.C. § 1, and California's Cartwright Act, Cal. Bus. & Prof. Code § 16720 (West 1964). Filco also asserted five other state law claims against Amana. The district court dismissed these latter claims after granting a motion for summary judgment on the Sherman Act and Cartwright Act claims. Filco appeals only from the summary judgment. We have jurisdiction under 28 U.S.C. § 1291. We affirm.

I

Amana manufactures and sells appliances throughout the United States. Filco is a partnership which owns a discount store in Sacramento, California. In 1974, Karadsheh, a partner and the manager of Filco, began ordering Amana products from Dusa, Amana's field representative. Filco claims, and Amana denies, that Filco became an official Amana dealer in January 1976. A retailer need not be an authorized dealer to receive merchandise from Amana. Regardless of whether it ever became an official dealer, Filco ordered Amana products from Dusa until his death in March 1976. In the following seven months, business between Filco and Amana apparently slowed but Filco continued to order products directly from Amana.

In October 1976, Amana sent Casimir, its new Sacramento representative, to solicit an order from Filco. Although what occurred at this meeting is substantially in conflict, all agree that despite Casimir's irritation with the presence of representatives of rival manufacturers, he initially took an order from Karadsheh for Amana products. When one of the other representatives began to mimic him, however, Casimir allegedly tore up the order and stormed out of the store. Amana's version differs only in that it

claims that Casimir canceled the order because he was directed to leave the store by Karadsheh. Filco's Saca later telephoned Casimir's superiors in an effort to ameliorate the dispute, but was informed that Amana would stand by Casimir's refusal to sell products to Filco. Although the argument between Casimir and Karadsheh severed direct relations between Filco and Amana, Filco has continued to order Amana products from a dealer in Southern California.

Filco claims that it was terminated because of complaints made to Amana by two of its competitors, Lamco and Boulevard, concerning Filco's discount pricing policies. The record supports a finding that Coppin, the owner of Lamco, made such a complaint, but no such finding can be made as to Boulevard's owner, Rich. Both Casimir and his supervisor admit that Amana was aware of dealer complaints about Filco's discounting practices.

In his deposition, Karadsheh testified that Casimir told him "I don't want Amana to be discounted. I don't want to make a K-Mart out of Amana, you know, with the low prices." Karadsheh also testified that Casimir stated: "If you want to have Amana, you have to do so and so. You have to maintain the price. You cannot discount it."

II

If no material facts are disputed, we view the record in the light most favorable to the party opposing the motion for summary judgment and determine whether the movant is entitled to prevail as a matter of law. *Fristoe v. Reynolds Metals Co.*, 615 F.2d 1209, 1213 (9th Cir. 1980). We consider only alleged facts that would be admissible in evidence. Fed. R. Civ. P. 56(e).

Of course, "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles . . . ." *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962); *Chisholm Brothers Farm Equipment Co. v. International Harvester Co.*, 498 F.2d 1137, 1139 (9th Cir.), *cert. denied*, 419 U.S. 1023 (1974) *(Chisholm Brothers)*. Nevertheless, if there is no genuine issue of material fact, and if the resisting party does not present a record sufficient to support a reasonable finding in his favor, a district court has a duty to grant the motion for summary judgment. *Cf.* 498 F.2d at 1139-40 (directed verdict).

Distributors terminated due to competitor complaints have provided a considerable amount of recent litigation, as well as scholarly commentary. *See, e.g.*, Piraino, *Distributor Terminations Pursuant to Conspiracies Among a Supplier and Complaining Distributors: A Suggested Antitrust Analysis*, 67 Cornell L. Rev. 297 (1982); Note, *Vertical Agreements to Terminate Competing Distributors:* Oreck Corp. v. Whirlpool Corp., 92 Harv. L. Rev. 1160 (1979); Note, *Vertical Agreement as Horizontal Restraint:* Cernuto, Inc. v. United Cabinet Corp., 128 U. Pa. L. Rev. 622 (1980). In the case before us, our focus is relatively narrow. The complaints to Amana concerned Filco's pricing practices and Filco alleges that this was the reason it was terminated.[1] Therefore, the per se rule is implicated.

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[1] "[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pacific Railway v. United States*, 356 U.S. 1, 5 (1958).

Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 51 n.18 (1977) (dictum); *United States v. Parke, Davis & Co.*, 362 U.S. 29, 46-47 (1960); *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 407-08 (1911); *see also California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 102 (1980) (dictum). Before we can apply the per se rule, however, we must first determine whether there is sufficient evidence to establish a combination or conspiracy.

Section 1 of the Sherman Act provides that any "combination . . . or conspiracy, in restraint of trade . . ." is illegal. 15 U.S.C. § 1. This phrase has been roughly translated to mean that a plaintiff must prove that a defendant engaged in "concerted action." L. Sullivan, *Handbook of the Law of Antitrust* § 109 (1977). Thus, in a case like the one before us, a plaintiff cannot overcome a motion for summary judgment without alleging sufficient facts to raise a reasonable inference of an illegal combination or conspiracy. Filco advances three theories of concerted action: a vertical conspiracy to fix prices between Lamco, Boulevard and Amana; an *Albrecht* conspiracy on the part of Amana to fix prices; and a horizontal conspiracy to fix prices between Lamco and Boulevard. We will examine each of these three theories in order.

A.

In *United States v. Colgate & Co.*, 250 U.S. 300 (1919) *(Colgate)*, the Court held that absent monopolistic purpose, a unilateral decision to refuse to deal with another company in the vertical chain of distribution is not actionable under the Sherman Act. Therefore, a manufacturer may announce legally that it will refuse to deal with any-

one who does not adhere to its suggested price schedule. *Id.* at 307. Pursuant to the *Colgate* doctrine, courts have generally required more proof of concerted action to fix prices on the vertical level than on the horizontal level. Sullivan, *supra*, § 139; *see Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 111 n.2 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981) *(Edward J. Sweeney & Sons), citing* P. Areeda, *Anti-Trust Analysis* 560 (2d ed. 1974).

However, an overt act by a manufacturer, in addition to a unilateral refusal to deal, may be actionable. *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944); *Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U.S. 441, 447-53 (1922). Filco relies especially on *United States v. Parke, Davis & Co.* In that case, Parke, Davis advised wholesalers and retailers that they must respect price floors. Wholesalers were used to detect violators at the retail level. Once a violation of its policy was detected, Parke, Davis would summon the noncomplying retailer and induce him to adhere to a price level. It would then use the first retailer's compliance to ensure the compliance of a second retailer. 362 U.S. at 33-36. The Court wrote that a combination exists if "the producer secures adherence to his suggested prices by means which go beyond his mere declination to sell to a customer who will not observe his announced policy." *Id.* at 43.

The crucial questions in the case before us are whether a jury may reasonably infer an illegal combination merely from competitors' complaints to a manufacturer and subsequent termination of the discounter, and, if not, what more is needed to overcome a summary judgment motion.

The general rule in other circuits is that a jury may not infer a conspiracy from competitor complaints plus termination alone. *Battle v. Lubrizol Corp.*, 673 F.2d 984, 991 (8th Cir.), *reh'g and reh'g en banc granted*, (May 21, 1982) (*Battle*); *Roesch, Inc. v. Star Cooler Corp.*, 671 F.2d 1168, 1172 (8th Cir.), *reh'g and reh'g en banc granted*, (May 21, 1982); *H.L. Moore Drug Exchange v. Eli Lilly & Co.*, 662 F.2d 935, 941 (2d Cir. 1981), *cert. denied*, ... U.S. ....., 103 S. Ct. 176 (1982) (*Moore*); *Oreck Corp. v. Whirlpool Corp.*, 639 F.2d 75, 80 (2d Cir. 1980), *cert. denied*, 454 U.S. 1083 (1981); *Edward J. Sweeney & Sons*, 637 F.2d at 111. Filco argues that the better rule is expressed in *Battle*, 673 F.2d at 991, and *Spray-Rite Service Corp. v. Monsanto Co.*, 684 F.2d 1226, 1238-39 (7th Cir. 1982), *cert. granted*, ... U.S. ....., 103 S. Ct. 1249 (1983) (*Spray-Rite*). Both *Battle* and *Spray-Rite*, however, expressly required sufficient evidence to show that the termination was *in response to* complaints by competitors. *Battle*, 673 F.2d at 991-92; *Spray-Rite*, 684 F.2d at 1238-39. Thus, those decisions required "evidence of a causal relationship between the competitor dealer's price-related complaints and the manufacturer's action." *Battle*, 673 F.2d at 992.

No case has been cited to us in which we have determined whether distributor terminations following complaints by competitors is sufficient to show the necessary illegal combination. Filco relies upon *Girardi v. Gates Rubber Co. Sales Division, Inc.*, 325 F.2d 196 (9th Cir. 1963) (*Girardi*), in which a competing distributor complained about Girardi's discounting practice to the manufacturer, Gates. We ruled that Girardi had produced enough evidence to overcome the motion for summary judgment. We stated:

> It is quite clear from what we have previously noted that Oranges [a competitor], and perhaps some other jobbers as well, complained to Gates about Girardi's price cutting. If Oranges complained, it would be a fair inference that his complaint was designed to get some action on the part of Gates. The very act of complaining carries the meaning: "I want you to do something about it."

Id. at 202. Despite this language, we relied on several facts which established that Gates actively attempted to control prices by refusing to deal with discounters. First, Gates had threatened to cancel Girardi in 30 days if he did not discontinue his discounting practices. *Id.* at 198. Second, two letters made it clear that competitors of Girardi had complained about his discounting policies, *id.* at 200-01, and that Gates's district manager desired to terminate Girardi. *Id.* at 203. Third, when Gates was subsequently considering whether to give a contract to a new distributor, the district manager explained to one of the complaining distributors that Gates would control the new distributor's market practice to avoid a "price eroding marketing policy." *Id.* at 202. Fourth, Girardi originally was terminated only in two geographical areas where he was discounting, but not in a third area where he was not, again implying a price support program. *Id.* at 197-98 & n.3. Fifth, a letter showed that Girardi was finally terminated completely and denied new orders because of strong pressure exerted by competitors as a result of his discounting policies. *Id.* at 203. We held that this evidence could give rise to an inference of a price support program and a conspiracy between at least one of the distributors and the manufacturer. *Id.* at 203-04.

In several cases since *Girardi*, we have sustained decisions holding that insufficient evidence was presented in vertical price fixing cases in which the facts were less strong. These cases make it clear that a plaintiff may show there is a jury question by alleging sufficient evidence of both concerted action and attempted coercion to enforce price levels. *Chisholm Brothers*, 498 F.2d at 1140 n.6; *accord General Cinema Corp. v. Buena Vista Distribution Co.*, 681 F.2d 594, 597 (9th Cir. 1982); *Santa Clara Valley Distributing Co. v. Pabst Brewing Co.*, 556 F.2d 942, 945 (9th Cir. 1977) (per curiam). For example, in *Chisholm Brothers*, we sustained the district court's order of a directed verdict because there was no systematic policy of refusing to deal with distributors who failed to comply with the price schedule, no threats, and no evidence of distributors following prices as there was in *Girardi*. 498 F.2d at 1141.

We commented on the issue of customers' complaints in dicta in *Westinghouse Electric Corp. v. CX Processing Laboratories, Inc.*, 523 F.2d 668 (9th Cir. 1975): "[a] combination violative of Section 1 of the Sherman Act cannot be implied from the fact that some of [the manufacturer's] customers complained of [a discounter's] practices, since it was the normal working of the marketplace for them to have done so." *Id.* at 675, *quoting Carbon Steel Products Corp. v. Alan Wood Steel Co.*, 289 F. Supp. 584, 588 (S.D. N.Y. 1968); *see also Carr Electronics Corp. v. Sony Corp. of America*, 472 F. Supp. 9 (N.D. Cal. 1979).

We conclude that competitor complaints plus termination is not sufficient evidence to raise an inference of unlawful conspiracy or combination. To rule otherwise would sub-

ject manufacturers to vexatious litigation because every terminated discounting distributor probably could point to complaints made by his competitors. Something more than complaints and termination must be shown to overcome a motion for summary judgment. We therefore must analyze the second question: what must Filco show in addition to overcome a motion for summary judgment? We hold that the additional showing can be made by either evidence of direct coercion or of a causal nexus between complaints and termination.

1.

Filco initially argues that the added requirement is met by evidence of overt coercion attempting to ensure compliance through threats or demands. *See Chisholm Brothers,* 498 F.2d at 1140 n.6. Demands or threats, however, must be distinguished from mere "exposition, persuasion, argument, or pressure." *Yentsch v. Texaco, Inc.,* 630 F.2d 46, 53 (2d Cir. 1980); *Chisholm Brothers,* 498 F.2d at 1142-43; *Gray v. Shell Oil Co.,* 469 F.2d 742, 748 (9th Cir. 1972), *cert. denied,* 412 U.S. 943 (1973).

Filco attempts to establish the added requirement by demonstrating overt coercion in two ways: first, by evidence of coercive behavior on the part of Amana in the Sacramento area, and second, by evidence of Amana's pricing practices throughout the United States. We first consider the evidence from the Sacramento area.

Filco admits that its strongest evidence is the testimony of Karadsheh concerning the meeting between him and Casimir in October 1976. Filco claims that Casimir threatened to terminate Filco if it continued to discount Amana products: "I don't want Amana to be discounted. I don't

want to make a K-Mart out of Amana, you know, with the low prices. . . . If you want to have Amana, you have to do so and so. You have to maintain the price. You cannot discount it." The issue raised is whether these statements are enough to raise an inference of coercion and thus create an inference of illegal combination.

We conclude that this evidence is not sufficient to create such an inference. The statements must be analyzed in the context in which they were made. Casimir testified that in his earlier visits to Filco he had not been impressed with the facilities; in fact, he described Filco as a "catalog house." In his discussion with Karadsheh, he emphasized that Filco would have to take a full line of Amana products, and that it would be required to devote sufficient floor space to display the products. It was his exhortation to Karadsheh to display the products properly that was later mimicked by one of the rival representatives present at the meeting. Although pricing was also discussed, Casimir's main concern was that Filco provide the presale services that are required by all stores selling Amana products. In this context, a statement that Amana did not want Filco to discount its products does not raise a sufficient inference of a threat or a demand, or otherwise constitute sufficient coercion to create an inference of a violation of section 1 of the Sherman Act.

Filco also offers Dusa's statement to Karadsheh, and later to Saca, as evidence of a demand or threat: "try to keep it down as far as prices because I have Lamco on my back. You're my friends. I don't want to lose their account, you know." The very tone of this passage indicates no threat, but rather mere encouragement.

Filco also claims that there is evidence from outside the Sacramento area of a nationwide conspiracy between Amana and its dealers to fix prices. This evidence, contained in 23 exhibits, was excluded by the district court as irrelevant because it did not relate to price fixing and because it was too remote from the events in the Sacramento area. Filco argues that the evidence is admissible under *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962) (*Union Carbide*), and that it establishes the additional evidence necessary to complete a prima facie case of conspiracy among Amana, Boulevard and Lamco.

Union Carbide is not directly on point. Continental alleged that it had been forced out of the market by Union Carbide's monopolistic practices and pointed to five different ventures in which it had failed because, each time, Union Carbide had cut off its source of raw materials. The Supreme Court held that it was error for the trial court to examine the five ventures "*seriatim*," as if they were "five completely separate and unrelated lawsuits." *Id.* at 698-99. It further stated that "plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Id.* at 699. Unlike Continental, Filco cannot claim that the excluded evidence relates to business activity that involved or affected it; rather it relates to other retailers in other parts of the country.

Even if *Union Carbide* is read expansively to allow evidence about events occurring in any part of the nation that may implicate Amana in a nationwide conspiracy, the district judge did not err in excluding the evidence in this case. The exhibits are nothing more than isolated memo-

randa involving Amana's attempts to deal with problems caused by transshipping. Filco argues that although this is a legitimate concern of a manufacturer, the jury should be allowed to determine whether this concern was merely a subterfuge to hide an attempt to establish fixed prices throughout the nation. It would not be reasonable, however, for a jury to infer such a conspiracy based solely on such insubstantial evidence. Thus, the district judge did not err in concluding that this evidence was irrelevant because it was not sufficiently related to a price fixing conspiracy.

Moreover, even if some of the memoranda are viewed as relating to potential price fixing, they are merely isolated incidents and do not amount to evidence of a nationwide pricing conspiracy. It is not unusual for an organization as large as Amana to receive complaints from its distributors about discounting competitors. This alone, however, cannot establish a nationwide conspiracy.

2.

Filco next contends that the added requirement is supplied in this case because its termination was in fact caused by competitors' complaints. As direct evidence of this causal link is ordinarily unavailable, circumstantial evidence becomes critical. Therefore, courts have looked at a variety of factors in assessing causation: the volume and intensity of complaints, *see, e.g., Spray-Rite*, 684 F.2d at 1239; *Moore*, 662 F.2d at 944; the time gap between receipt of complaints and termination, *see, e.g., Battle*, 673 F.2d at 992; *Moore*, 662 F.2d at 944; *Edward J. Sweeney & Sons*, 637 F.2d at 114; and whether the manufacturer had a valid, independent reason for terminating the discounting

dealer. *See, e.g., Spray-Rite,* 684 F.2d at 1239 & n.8; *Edward J. Sweeney & Sons,* 637 F.2d at 113-14. *But see Battle,* 673 F.2d at 992 (question of independent reason is for the jury); *Moore,* 662 F.2d at 943 (other reasons to terminate "makes it neither more or less probable that [the manufacturer] acted in concert with others rather than unilaterally").

Although none of these factors alone would be strong evidence of illegal concerted action, a combination of them could provide the necessary nexus between complaints and termination and at least allow the plaintiff to present his case to the jury. In contrast, resolution of some of these questions in favor of the defendant would probably indicate that a reasonable inference of conspiracy is not possible. Courts must balance their duty to protect manufacturers or suppliers from vexatious litigation with their responsibility not to usurp the jury's function as factfinder.[2]

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[2]In analyzing the added requirement, we do not accept Amana's invitation to embrace the language in *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 110 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981) (*Edward J. Sweeney & Sons*), indicating that it is not enough for a plaintiff to show a causal relationship between complaints and termination. Such a rule seems to contradict the Supreme Court cases which forbid policing activities on the part of manufacturers. We see no significant difference between a manufacturer who engages distributors to help police a pricing system and a manufacturer who terminates discounters in response to complaints from distributors. Furthermore, we think the *Edward J. Sweeney & Sons* standard goes beyond what courts generally have required of plaintiffs to overcome a motion for summary judgment in cases involving distributor complaints. *See id.* at 123-25 (Sloviter, J., dissenting).

Amana argues that we should adopt a stricter standard because a manufacturer should be allowed to terminate a discounting distributor if the manufacturer is merely trying to eliminate a free

It is clear in this case that there were complaints about Filco's discounting practices. Casimir testified, however, that these complaints were merely the type typically made by competing dealers, and that they had no influence on his behavior toward Filco. Filco, on the other hand, points to testimony of Mrs. Dusa, the widow of the first Amana representative, that Amana received voluminous and virulent complaints about Filco.

Mrs. Dusa's testimony is based on conversations she had with her husband concerning telephone conversations he had with representatives of Lamco, Boulevard and Amana, indicating that the distributors were upset with Filco's pricing policies. Besides being based on multiple hearsay, Mrs. Dusa's testimony is weak because she could not remember any specifics, but testified only to vague impressions and memories of conversations. She also testified that the conversations had no effect on her husband's decision whether or not to retain Filco as a dealer. At best, her testimony, if admissible, implies that distributors objected to Filco's pricing policies and that this made Filco less desirable as an Amana retailer. Her testimony provides no support for a link between the complaints and a subsequent termination by Amana seven months after her husband died. Indeed, the long time gap, at least seven to nine months, between the time dealers first complained to Dusa and the time that Filco was terminated suggests that Filco's termination was not caused by the complaints.

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rider problem. (The short and conclusive answer to that contention is that the Supreme Court rejected the "free rider" argument in the price fixing area when it decided to retain the per se rule in cases of resale price maintenance and vertical price fixing. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 51 n.18 (1977).)

Filco's argument is further refuted by Amana's sending a new dealer representative to take an order from Filco, long after the receipt of the complaints, and even though that representative believed that Filco was not a franchised dealer. Filco claims that Amana never intended to keep it as a dealer and that the visit to Filco was not made in good faith, but the uncontradicted evidence is to the contrary.

Filco also cites evidence that Amana was happy to be rid of Filco, and that this was partially due to Amana's displeasure over Filco's pricing policies. Again, this evidence is not probative because under *Colgate* Amana, acting unilaterally, is free to discontinue supplying products to Filco for any reason it wants, including Filco's discounting practices.

Finally, it is very significant that there is no evidence that either Filco or the other retailers adhered to Amana's price guidelines. Casimir, Rich and Coppin testified that Lamco, Boulevard and other retailers generally did not follow the suggested prices. The only evidence Filco can point to is the hearsay statement from Dusa to Karadsheh that representatives from Lamco and Boulevard had told him that they were adhering to Amana's suggested prices. This evidence, however, was properly ruled inadmissible. In addition, Karadsheh's partner, Saca, admitted that Boulevard, Lamco and Filco all priced at competitive levels, below Amana's suggested retail prices. (Although Filco may have discounted to a greater extent than did Boulevard and Lamco, the record indicates that all the dealers discounted Amana's products.)

We conclude that Filco has failed to establish, in addition to competitor complaints and termination, sufficient evidence of either direct coercion or of a causal nexus between the complaints and termination to raise a reasonable inference of an illegal combination.

B.

Filco's next theory is that Amana independently coerced Filco into adhering to a price schedule and that Filco acquiesced. If Filco could prove this, a conspiracy would be established. Under *Albrecht v. Herald Co.*, 390 U.S. 145 (1968) (*Albrecht*), acquiescence by a retailer makes it the second party to the conspiracy. *See id.* at 150 n.6 (dicta); *Chisholm Brothers*, 498 F.2d at 1140 n.6 (dicta).

In applying this *Albrecht* theory, we have held that the plaintiff must establish two elements: (1) that defendant pressured plaintiff into maintaining prices at a certain level, and (2) that this coercion actually impinged upon plaintiff's freedom to set prices. *Id.* at 1140-43 & 1140 n.6; *see also Santa Clara Valley Distributing Co. v. Pabst Brewing Co.*, 556 F.2d at 945; *Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1355-57 & nn.3-4 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977). The second element will usually be shown by proving that the plaintiff did in fact maintain the suggested prices. *Hanson v. Shell Oil Co.*, 541 F.2d at 1357 & nn. 3-4; *Chisholm Brothers*, 498 F.2d at 1140 n.6.

There is insufficient evidence to raise a genuine issue of material fact regarding coercion on Amana's part, although Amana may have expressed displeasure with Filco's activities. Indeed, there is little evidence that Filco acquiesced in Amana's demands. Although Karadsheh

testified that Filco usually adhered to the suggested prices, his testimony is contradicted by Saca who testified that Filco sold at discount prices.

Moreover, Filco is arguing contradictory theories. To prove a vertical conspiracy to fix prices, Filco argued that it was terminated because it refused to maintain Amana's suggested prices. Under the *Albrecht* theory, it now argues that it acquiesced in Amana's demands. The two theories are mutually exclusive. The evidence shows, and Filco admits, that it did not acquiesce in Amana's pricing demands. Therefore, Filco fails to establish an *Albrecht* conspiracy.

C.

Filco's third theory is that the two retailers, Lamco and Boulevard, conspired to set prices at the retail level by adhering to Amana's suggested retail prices. Courts often will apply a lesser standard for plaintiffs to meet in establishing a horizontal combination, since the *Colgate* rule does not apply to such combinations. Sullivan, *supra*, §§ 110-11, 139. Nevertheless, even the "conscious parallelism" cases illustrate that a complex pattern of behavior on the part of defendants must be shown in order to infer an agreement. *Interstate Circuit, Inc. v. United States,* 306 U.S. 208 (1939); *see also United States v. Paramount Pictures, Inc.,* 334 U.S. 131 (1948); *American Tobacco Co. v. United States,* 328 U.S. 781, 809-10 (1946) (discussing conspiracy to monopolize). Moreover, in this circuit it has long been the rule that conscious parallelism alone is insufficient to establish an inference of conspiracy. *Syufy Enterprises v. National General Theatres, Inc.,* 575 F.2d 233, 236 (9th Cir. 1978), *cert. denied,* 439 U.S. 954 (1979);

C-O-Two Fire Equipment Co. v. United States, 197 F.2d 489, 497 (9th Cir.), *cert. denied*, 344 U.S. 892 (1952).

In its attempt to prove a horizontal conspiracy, Filco points out that Coppin and Rich knew each other professionally and that price sheets were routinely mailed by Amana to distributors. As indicated earlier, however, there is no evidence that Lamco and Boulevard ever complied with Amana's suggested retail prices or otherwise priced at a fixed level. Thus, there is no evidence in the record that Lamco and Boulevard engaged in parallel behavior. There is no evidence that Boulevard complained about Filco's pricing. Even if there were and thus both competitors complained, the common practice of complaining about a discounting competitor is insufficient to establish an inference of horizontal conspiracy.

Filco's case is clearly based on its argument that Lamco and Boulevard were pricing at the same level. Even if this were sufficient, it has not been established, and there is thus insufficient evidence of a horizontal conspiracy.

III

Filco objects to the exclusion of testimony by Karadsheh that Dusa told him that Lamco and Boulevard were adhering to Amana's suggested prices. Filco argues that this testimony is crucial because it establishes both a vertical conspiracy among the three defendants and a horizontal conspiracy between Boulevard and Lamco. The district judge ruled that the statement was inadmissible hearsay. Filco claims that the statement is an admission by a party and therefore admissible under Federal Rule of Evidence 801(d)(2).

The statement would be admissible to help prove the alleged horizontal conspiracy if it was being offered as an admission by Dusa concerning his own liability. However, to admit Dusa's statement to prove that Lamco and Boulevard were adhering to Amana's prices, Filco must prove that Dusa was a co-conspirator and that the statement was made in furtherance of a conspiracy. Fed. R. Evid. 801 (d)(2)(E).

Hearsay statements by a co-conspirator are not admissible against a defendant unless there is independent evidence of the existence of a conspiracy and of the defendant's participation in the conspiracy. *United States v. Mason*, 658 F.2d 1263, 1269 (9th Cir. 1981). The rule is not limited to criminal cases, but applies in civil cases as well. *See Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110, 116-17 (1948); *Rutledge v. Electric Hose & Rubber Co.*, 327 F. Supp. 1267, 1274 (C.D. Cal. 1971), *aff'd*, 511 F.2d 668 (9th Cir. 1975).

Thus, Dusa's testimony would be admissible only if there were independent evidence of a conspiracy between Dusa, Lamco, and Boulevard. There is no such evidence; therefore, the statement is not admissible. Other statements allegedly made by Dusa, one that Coppin and Rich complained and another implying that Boulevard threatened to boycott Amana, were properly excluded by the district court as inadmissible hearsay for the same reason.

Similarly, the statements are inadmissible under the vertical conspiracy theory because there is a failure of independent evidence of such a conspiracy. We are persuaded by a recent Second Circuit case with facts very

similar to those before us in which the court held that evidence was hearsay and not admissible due to the lack of independent evidence of a conspiracy. *Oreck Corp. v. Whirlpool Corp.*, 639 F.2d at 80-81.

IV

Filco last complains that the district court also erred in granting summary judgment on Filco's state law claim under the California Cartwright Act, rather than merely entering a dismissal. If a federal claim is dismissed before trial, any pendent state matters usually should be dismissed as well. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966); *Townsend v. Columbia Operations*, 667 F.2d 844, 850 (9th Cir. 1982). In this case, however, Filco bases its state law claim on the same facts on which it bases its Sherman Act claim. The Cartwright Act, Cal. Bus. & Prof. Code § 16720(d) (West 1964), forbids price fixing by a "combination of capital, skill or acts by two or more persons . . . ." Cartwright Act claims raise basically the same issues as do Sherman Act claims. *See Milton v. Hudson Sales Corp.*, 152 Cal. App. 2d 418, 439-41, 313 P.2d 936, 950 (1957). California cases illustrate that state courts follow federal decisional law in deciding claims under the Cartwright Act. *See, e.g., R.E. Spriggs Co. v. Adolph Coors Co.*, 94 Cal. App. 3d 419, 425-26, 156 Cal. Rptr. 738, 741 (1979), *cert. denied*, 444 U.S. 1076 (1980). Therefore, we affirm the district court's entry of summary judgment as to both the Sherman and the Cartwright Act claims.

AFFIRMED.